

Court to widen the judicial interpretation of the specific terms used in the provisions in question in order to bring cohabitation within the definition of marriage. Any extension of that concept would alter the legal basis of the provisions in question, with serious legal and financial consequences for the Communities and for third parties. A change on that scale can

only be made by the Community legislature if it considers such a change to be necessary.

2. The duty to have regard to the interests of officials cannot lead the administration to interpret a Community provision in a manner contrary to the specific wording of that provision.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
17 June 1993 ³⁰

In Case T-65/92,

Monique Arauxo-Dumay, widow of Louis Dumay, a former official of the Commission of the European Communities, residing at Saint-Flovier (France), represented by Georges Vandersanden, of the Brussels Bar,

applicant,

v

Commission of the European Communities, represented by Joseph Griesmar, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision, notified to the applicant by letter of 16 December 1991, refusing her a widow's pension and

³⁰ Language of the case: French.

further entailing withdrawal of her cover under the Joint Sickness Insurance Scheme as from 1 April 1992,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of: C. W. Bellamy, President, H. Kirschner and A. Saggio, Judges,

Registrar: J. Palacio González,

having regard to the written procedure and further to the hearing on 23 March 1993,

gives the following

Judgment

Facts of the case

- 1 The applicant, Mrs Monique Arauxo-Dumay, a Belgian national, is the widow of Mr Louis Dumay, also a Belgian national, who died on 1 December 1991. From 1 March 1964 to 30 September 1986 Mr Dumay was an official, first at the Commission of the European Atomic Energy Community and, subsequently, at the Commission of the European Communities. On 1 October 1986, at Mr Dumay's request, his service was terminated pursuant to Council Regulation (ECSC, EEC, Euratom) No 3518/85 of 12 December 1985 introducing special measures to terminate the service of officials of the European Communities as a result of the accession of Spain and Portugal (OJ 1985 L 335, p. 56).
- 2 From 1 October 1986 until his death, Mr Dumay received a monthly allowance under Article 4(1) of Regulation No 3518/85 equal to 70% of his basic

salary before deduction, pursuant to Article 4(7) of Regulation No 3518/85 in conjunction with Article 83(2) of the Staff Regulations, of a contribution to the funding of the pension scheme under the Staff Regulations, calculated by reference to the salary for his grade and step.

3 Mr Dumay was married for the first time in 1952, but cohabited with the applicant from the early 1980s. He lodged a petition for separation from his first wife in 1981, but his divorce decree of 3 April 1989 was entered in the registers of births, deaths and marriages only on 10 July 1989.

4 On 27 July 1989 he married the applicant with whom he had continued to live in the meantime. Consequently the marriage had only lasted a little more than two years and four months when Mr Dumay died.

5 Following Mr Dumay's death, the applicant was informed of the consequences thereof in relation to her rights by a letter of 16 December 1991 from the Head of the 'Pensions and Relations with Former Officials' Unit at the Commission's Directorate General for Personnel and Administration. In particular, the letter stated:

'I regret to inform you that as you were married for less than five years, you do not qualify for a widow's pension. This also means that you will no longer be covered by the Community Sickness Fund as from 1 April 1992.'

6 On 9 March 1992 the applicant submitted a complaint under Article 90(2) of the Staff Regulations against the decision contained in that letter. She received no response to the complaint.

Procedure

- 7 In those circumstances, the applicant first submitted an application for legal aid under Article 94 of the Rules of Procedure of the Court of First Instance, lodged at the Court Registry on 15 September 1992 and, secondly, brought this action by application lodged at the Registry on 5 October 1992.
- 8 The Court (Fourth Chamber) granted the applicant legal aid by order of 24 November 1992.
- 9 The written procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry, but requested the parties to explain at the hearing their position regarding the relevant provisions of the Staff Regulations.
- 10 The oral procedure took place on 23 March 1993. The parties' representatives presented oral argument and replied to the questions put to them by the Court.

Forms of order sought by the parties

- 11 The applicant claims that the Court should:
- declare the application admissible and well founded;
 - accordingly, annul the Commission's decision, notified to the applicant by letter of 16 December 1991, refusing her a widow's pension and further entailing withdrawal of her cover under the Joint Sickness Insurance Scheme as from 1 April 1992;
 - order the defendant to pay the costs.

The defendant contends that the Court should:

- dismiss the application as unfounded;
- make an appropriate order as to costs.

Substance

- 12 In support of her claims, the applicant relies on two pleas in law, based respectively on infringement of the Staff Regulations and breach of the duty to have regard to the interests of officials.

First plea: infringement of the Staff Regulations

Arguments of the parties

- 13 The applicant states first of all that her husband had to pay contributions to the pension scheme and that Article 4(7) of Regulation No 3518/85 allows the acquisition of further pension rights, thereby encouraging officials to request the application of measures concerning termination of their service (see the judgments in Case T-4/90 *Lestelle v Commission* [1990] ECR II-689, paragraphs 38 to 40 and 43, and in Case T-21/90 *Generlich v Commission* [1991] ECR II-1323, paragraphs 37 and 40). The Community legislature was therefore concerned not to deny the advantages linked to the pension scheme to officials benefiting from measures to terminate their service.
- 14 As for the provisions applicable, the applicant claims in her application that Articles 17a and 20 of Annex VIII to the Staff Regulations apply to her case. Article 17a provides as follows:

‘... the widow of a former official who was removed from his post or whose service was terminated by virtue of Regulation (EEC, Euratom, ECSC) No 259/68, (Euratom, ECSC, EEC) No 2530/72 or (ECSC, EEC, Euratom) No 1543/73 and who died whilst in receipt of a monthly allowance ... under one of the abovementioned

regulations shall be entitled, provided that she had been married to him for at least one year when he left the service of an institution, to a widow's pension, equal to 60% of the retirement pension to which her husband would have been entitled ...'.

Article 20 of Annex VIII to the Staff Regulations provides that:

'For the purpose of Articles 17a, 18, 18a and 19, the duration of the marriage shall not be taken into account where the marriage, though contracted after termination of the official's service, has lasted at least five years.'

- 15 The applicant accepts that neither the condition as to the duration of the marriage for a minimum of one year prior to the date of termination of service, provided for by Article 17a of Annex VIII to the Staff Regulations, nor the condition as to a marriage of at least five years' duration on the date of death provided for by Article 20 of Annex VIII is fulfilled if the word 'married' is given its legal meaning, but contends that her long-standing cohabitation with Mr Dumay since at least 1982 reflects the existence of a factual situation meeting either of those conditions. She claims that she would have married Mr Dumay much earlier had it not been for his first wife's vigorous opposition to the divorce.
- 16 In support of her argument for taking the factual circumstances into account, the applicant cites various provisions of Belgian law which are said to recognize cohabitation as having certain legal effects. These provisions relate, in particular, to paternity, social security, the definition of 'head of the household', entitlement to pension arrears not paid to a deceased recipient, calculation of a child maintenance allowance and the existence of a natural obligation of maintenance as between cohabitantes.
- 17 Moreover, the rule in Belgian law is said to be that, in order for the surviving spouse of an employed person to be able to claim a survivor's pension, the marriage must have lasted for at least one year prior to death. The requirement of a prior duration of five years is therefore discriminatory to the extent that it denies the applicant the right to a pension to which she would have been entitled under the Belgian system.

18 In its defence, the defendant points out that, according to the judgment in Case T-41/89 *Schwedler v Parliament* [1990] ECR II-79, paragraph 23, Community legal measures which create a right to financial benefits must be given a strict interpretation.

19 The defendant adds that the applicant's position is expressly governed by Article 4(8) of Regulation No 3518/85, according to which

‘... the surviving spouse of a former official who dies while in receipt of the monthly allowance provided for in paragraph 1 shall be entitled, provided that he or she had been his or her spouse for at least one year when the former official left the service of an institution, to a survivor's pension ...’,

and that that paragraph contains no exception equivalent to that in Article 20 of Annex VIII to the Staff Regulations.

20 The defendant notes that the applicant does not deny that she fails to satisfy the conditions laid down in that provision or in Articles 17a and 20 of Annex VIII to the Staff Regulations, even if those provisions are considered, by means of a wide interpretation, to be applicable in the present case, although they do not refer to Regulation No 3518/85.

21 Furthermore, the defendant denies the relevance of the applicant's arguments concerning her factual situation. The relevant provisions refer quite clearly to the concept of ‘spouse’, and cohabitation cannot, by way of interpretation, be treated as marriage. The defendant refers in particular to the judgment in Case 59/85 *Reed* [1986] ECR 1283, paragraph 15, and the judgment in Case T-43/90 *Díaz García v Parliament* [1992] ECR II-2619, paragraph 43.

22 As for the applicant's references to the recognition by Belgian law of the legal effects of cohabitation, the defendant also denies that this is relevant, particularly because the Staff Regulations must in its view be applied uniformly to all persons who rely upon them, regardless of their nationality or their ties with a national pension scheme. The defendant also denies the relevance of particular examples taken by the applicant from Belgian law and notes that she has not cited any case-law to support the interpretation which she wishes to be applied in the present case.

23 The defendant concludes by pointing out that the *Lestelle* and *Generlich* judgments, cited above, deal with completely different problems. The fact that the Community legislature did not intend to deprive former officials whose service was terminated of their benefits under the Staff Regulations does not mean that the surviving spouse of such an official can receive a pension on preferential conditions, that is to say, as if the deceased had remained in his post until his death, which would allow his widow to receive a widow's pension pursuant to Article 17 of Annex VIII to the Staff Regulations which requires a marriage of at least of one year's duration as a precondition.

24 At the hearing, the applicant made it clear that her action was based on Regulation No 3518/85 save to the extent to which it deprives interested parties of the benefit of a provision on which they could have relied in the context of other regulations governing identical situations, namely, in the present case, Article 20 of Annex VIII to the Staff Regulations. In order to dispose of objections based on the clear terms of the Staff Regulations and of Regulation No 3815/85, she relied on the principle of equal treatment. Pointing out that, in the case of the surviving spouse of an official who dies while still in his post, it is sufficient, according to Article 17 of Annex VIII to the Staff Regulations, for the marriage to have lasted for one year at the time of his death to confer entitlement to a pension, the applicant contended that the different rule for the surviving spouse of an official who dies after the termination of his service gives rise to unequal treatment.

- 25 At the hearing, the Commission stated that in its view the exception provided for by Article 20 of Annex VIII to the Staff Regulations covered only situations governed by the regulations referred to in Article 17a of that annex, adding that, in the interest of fairness, it is the administration's practice to apply Article 20 of Annex VIII to the Staff Regulations by analogy in cases such as that of the applicant.

Findings of the Court

- 26 First of all, the question arises of whether the present case is governed exclusively by Article 4(8) of Regulation No 3518/85 or whether Articles 17a and 20 of Annex VIII to the Staff Regulations can also be considered to apply by analogy. However, the Court takes the view that it is unnecessary, for the purposes of resolving the present dispute, to decide this question once and for all in so far as it is clear from what follows that the outcome in this case is the same whatever answer is given.
- 27 Under Article 4(8) of Regulation No 3518/85, the 'surviving spouse' of a deceased official is entitled to a survivor's pension provided that he or she had been the 'spouse' of the deceased official for at least one year when the former official left the service of an institution. The same condition is laid down, using the terms 'widow' and 'married', in Article 17a of Annex VIII of the Staff Regulations, subject to the exception provided for in Article 20 of that annex, under which the condition as to prior duration does not apply where the 'marriage', even if contracted after termination of the official's service, lasted at least five years.
- 28 The legal definition, as much as the ordinary meaning of the words 'spouse', 'widow' and 'married', refers to persons who have formally contracted a civil marriage recognized by law, with all the rights and obligations which that entails. However, it is common ground that such a civil marriage was not contracted by the applicant and Mr Dumay until 27 July 1989, that is to say after Mr Dumay's service was terminated on 1 October 1986 and less than five years before his death on 1 Decem-

ber 1991. Furthermore, at the relevant date for determining the rights to a survivor's pension under Article 17 of Annex VIII to the Staff Regulations and under Article 4(8) of Regulation No 3518/85, that is to say on the date when he left the service of an institution and for part of the five-year period referred to in the context of the exception under Article 20 of Annex VIII to the Staff Regulations, Mr Dumay had a spouse within the meaning of the abovementioned definition and that spouse was not the applicant.

29 Consequently, in the present case neither the condition laid down by Article 4(8) of Regulation No 3518/85 nor those laid down by Article 17a in conjunction with Article 20 of Annex VIII to the Staff Regulations have been met, even assuming that they apply.

30 The Court, while aware of the social context in which this action has been brought, does not consider that it is competent to widen the judicial interpretation of the specific terms used in the Staff Regulations in order to bring cohabitation within the definition of 'marriage', or 'cohabitee' within that of 'husband' or 'wife'. This conclusion, which conforms with that of the Court of Justice in the *Reed* judgment, cited above, in the context of interpreting Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II), p. 475), also takes account of the fact that numerous provisions of the Staff Regulations use the terms 'spouse' and 'marriage' and that any extension of those concepts would alter the legal basis of the provisions in question, with serious legal and financial consequences for the Communities and for third parties. A change on that scale can only be made by the Community legislature if it considers such a change to be necessary.

31 As for the applicant's argument that certain situations reflecting social trends in her national law should be taken into account in order to widen the definition of 'marriage' for the purposes of the Staff Regulations, the Court does not consider it appropriate in the present case to refer to the provisions of national law cited for the purpose of interpreting the Community provisions in question.

32 With regard to the applicant's argument based on the fact that Mr Dumay had to continue paying contributions to the pension scheme after the termination of his service, the Court observes that this is an obligation laid down by Article 4(7) of Regulation No 3518/85, which aims to allow those concerned to acquire further rights to a retirement pension. Although the payment of such contributions affects the amount of the survivor's pension, it is irrelevant to the question whether or not such a pension is payable under the Staff Regulations.

33 Finally, regarding the applicant's reliance on the principle of equal treatment, it must be borne in mind that in the present case it is necessary to determine whether the right to a survivor's pension can be claimed by the surviving spouse of a former official who died after his service was terminated and after he had received the benefits and advantages provided for by a regulation governing that situation, characterized by the fact that there was no obligation to carry on working. This situation differs fundamentally from that of the surviving spouse of an official who continued to perform his duties until his death.

34 It follows that the first plea in law is unfounded and must therefore be rejected.

Second plea in law: breach of the duty to have regard to the interests of officials

Arguments of the parties

35 The applicant claims that the manner in which the Commission applied the rules was excessively strict and took no account of the fact that Mr Dumay had continued to pay contributions to the pension scheme or of the applicant's destitution. It would have been quite possible to adopt a wide interpretation of the relevant provisions by bringing them into line with the more generous rule of national law. In failing to do so, the Commission was in breach of its duty to have regard to the interests of those entitled under former officials.

36 The defendant points out that the duty to have regard to the interests of officials reflects a balance between reciprocal rights and obligations created by the Staff Regulations for relations between the public authority and public service employees (Joined Cases T-59/91 and T-79/91 *Eppe v Commission* [1992] ECR II-2061, paragraph 66) and must always be subject to compliance with the legal rules in force (Case T-123/89 *Chomel v Commission* [1990] ECR II-131, paragraph 32).

Findings of the Court

37 As stated above (paragraphs 28 and 30), the meaning of the relevant provisions in this case is clear and the applicant cannot, by invoking the duty of an institution to have regard to the interests of officials, seek to obtain a different result from that which must follow from applying those provisions, since they circumscribe the powers of that institution.

38 However, the Court observes that at the hearing the defendant drew attention to the provisions of Article 76 of the Staff Regulations, which are quite distinct, whereby gifts, loans or advances may be made, where an official has died, to those entitled under him who are in a difficult position by reason of family circumstances.

39 It follows from all the foregoing considerations that the application must be dismissed in its entirety.

Costs

40 In accordance with Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. However, under Article 88 of those Rules, in proceedings between the Communities and their servants the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

- 1. Dismisses the application;**
- 2. Orders the parties to bear their own costs.**

Bellamy

Kirschner

Saggio

Delivered in open court in Luxembourg on 17 June 1993.

H. Jung

C. W. Bellamy

Registrar

President